Enforcement Guidelines on:

The Abuse of Dominance Provisions

(Section 78 & 79 of The Competition Act)

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DRAFT

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ENFORCEMENT GUIDELINES ON ABUSE OF DOMINANCE PROVISIONS [DRAFT]

(SECTION 78 & 79 OF THE COMPETITION ACT)

EXECUTIVE SUMMARY

Purpose and Scope of these Guidelines

As part of the Competition Bureau's continuing efforts to ensure a transparent and predictable enforcement policy, these guidelines provide an outline of the Competition Bureau's approach to enforcing the abuse of dominance provisions contained in sections 78 and 79 of the *Competition Act*.

The guidelines are organized into the following five parts:

Part 1- Overview of the abuse of dominance provisions;
Part 2- Institutional framework for enforcement;
Part 3- Key elements of section 79;
Part 4- Anti-competitive acts;
Part 5- Remedies.

What Constitutes "Abuse of a Dominant Position"?

Abuse of a dominant position occurs when a dominant firm in a market, or group of firms, engage in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors with the result that competition is prevented or lessened substantially. These provisions establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in activities that damage or eliminate competitors and maintain, entrench, or enhance their market power.

The Bureau's enforcement policy is to vigorously pursue cases that meet the elements of section 79. These guidelines make it clear that section 79 is not intended to prohibit dominance or the presence of market power. Rather, the section seeks to address the "abuse" of a dominant market position used to substantially prevent or lessen competition. While the ability to raise prices or maintain high prices is strongly indicative of the existence of dominance or market power, high prices, in and of themselves, do not prohibit or constrain competition. These guidelines make it clear that in enforcing these provisions, the Bureau will not attempt to tilt the playing field in favour of any particular market participant nor will it otherwise protect competitors from the challenges of legitimate competition.

Section 79 sets out three essential elements, all of which must be found to exist by the Competition Tribunal for it to grant an order. These three elements are:

1. One or more firms substantially or completely control a relevant market;
2. This firm, or firms, have engaged in a practice of anti-competitive acts;
3. The practice has prevented or lessened, or is likely to prevent or lessen competition substantially in a market.

How the Bureau Establishes Dominance

The first factual question that the Bureau must resolve in examining an allegation of abuse is whether "one or more persons, substantially or completely control, throughout Canada or any area thereof, a class or species of business." For the purposes of enforcing section 79, the Bureau treats the elements "class or species of business" as synonymous with the relevant product market. Likewise, it approaches the element of "throughout Canada or any area thereof" as synonymous with the relevant geographic market. In defining relevant markets, the Bureau employs a standard economic approach that takes into account a variety of factors, the most important of which are the availability of close substitutes, transportation costs and customer

switching costs.

The element of "substantially or completely control" in section 79, or dominance as it is commonly referred to, is considered by the Bureau to be synonymous with market power. The most straight forward example of market power is the ability to profitably raise prices above competitive levels for a considerable period of time. It is sometimes difficult to measure market power directly. Consequently, the Bureau collects evidence and assesses a number of qualitative and quantitative factors including technological change, recent entry or exit from the market, industry supply capacity and countervailing market power on the part of customers and distributors. However, the Bureau places the greatest emphasis on the key factors of market share and barriers to entry.

The objective of this analysis is to determine the extent to which a firm, or group of firms, are constrained from pricing above competitive levels due to the presence of effective competition or the likelihood of competitive entry. In the case of entry barriers, the Bureau will assess not only whether entry is possible or likely, but also the time period required for an entrant to become a viable and effective competitor.

All other things being equal, the higher the market share held by a firm or group of firms acting together, the greater the likelihood they will possess market power. Given that high market shares may be mitigated by other factors, and that the dispersion of market shares among other competitors may be significant, there are no hard and fast rules as to the relationship between market share and dominance. However, the Bureau's general approach to evaluate allegations of abuse of dominance is as follows:

- A market share of less than 35% will generally not give rise to concerns of market power or dominance;
- A market share of over 35 % will generally prompt further examination;

- A market share greater than 50% in the case of a single firm will *prima facie* be considered dominant. In the case of a group of firms alleged to be jointly dominant, a combined market share of the group which exceeds 60 to 65% will prompt further examination.

The reference to "one or more persons" in section 79 contemplates a situation where a group of unaffiliated firms, none of which on their own are dominant, may collectively possess market power. In assessing cases where joint dominance is alleged, the Bureau will consider:

(a) Whether the group of firms collectively accounts for a large share of the relevant market;
(b) Whether there is co-ordinated behaviour and whether such behaviour is anti-competitive;
(c) Barriers to entry into the group as well as barriers to entry into the relevant market;
(d) Whether actions have been taken by members of the group to inhibit intra-group rivalry;
(e) Whether customers can exercise countervailing market power to offset the attempted abuse.

"Anti-competitive Acts"

Having defined a relevant product and geographic market and determined sufficient conditions to give rise to a finding of dominance, the second element required under section 79 is to establish that the firm or firms in question have engaged in a "practice of anti-competitive acts." The word "practice" is normally more than an isolated act. Within the meaning of section 79 and as reflected in the jurisprudence, a "practice" can encompass one occurrence that is sustained or systematic over a period of time, or a number of different acts taken together which have the effect of substantially preventing or lessening competition.

Section 78 provides an illustrative list of nine potentially anti-competitive acts. None of the acts described in section 78 are, in and of themselves, necessarily anti-competitive. Accordingly, for an act to be considered anti-competitive there must be some element of anti-competitive design, purpose or object that is predatory, exclusionary or disciplinary.

The anti-competitive acts listed in section 78 are as follows:

(a) Margin squeezing by a vertically integrated supplier against a customer-competitor;
(b) Acquisition by a supplier of a customer to foreclose a competitor;
(c) Freight equalization on a competitor's plant to eliminate or impede competition;
(d) Selective use of fighting brands to discipline or eliminate a competitor;
(e) Pre-emption of scarce facilities or resources required by a competitor;
(f) Buying up products to prevent price erosion;
(g) Adopting incompatible specifications to prevent entry or eliminate a competitor;
(h) Requiring or inducing suppliers to sell only or primarily to certain customers;
(i) Selling articles below acquisition costs to discipline or eliminate a competitor.

Section 78 is simply illustrative for the guidance of the Competition Tribunal. The list is non-exhaustive. In a number of cases, the Bureau has alleged, and the Tribunal has accepted, that practices not included in section 78 constituted anti-competitive acts which can be addressed under section 79. An example of such practices is contractual arrangements between suppliers and customers that create exclusivity which forecloses market access to competitors. In addition to the discussion of anti-competitive acts which appears in Part 4 of these Guidelines, Appendix III deals specifically with anti-competitive margin squeezing by vertically integrated suppliers.

The jurisprudence under section 79 has held that the element of anti-competitive intent or purpose can be established either with direct evidence or by inference based on the likely effect of a practice on competition in the particular circumstances of a case.

Unlike the merger provisions of the *Competition Act*, section 79 does not provide for an explicit efficiency trade-off in assessing acts which are considered to be anti-competitive, but which may be efficiency enhancing. Accordingly, where a practice of anti-competitive acts has been established that meets the threshold of substantially lessening or preventing competition, but the party maintains that the act was intended for the purposes of achieving some pro-competitive outcome, the Bureau will bring the matter before the Tribunal for adjudication.

The Test of Substantial Prevention or Lessening of Competition

The meaning of "lessening competition substantially" is established in case law. The question to be decided is whether the anti-competitive acts engaged in by a firm or group of firms serves to preserve, entrench or enhance their market power. The test of "preventing or lessening competition substantially" places the focus squarely on competition, rather than competitors. Generally speaking, if the first two elements are satisfied (i.e. the presence of a dominant firm or firms with market power in a relevant market and a practice of anti-competitive acts), a finding of a substantial prevention or lessening of competition is likely to follow. However, in any given case, the degree of dominance, the nature and severity of the anti-competitive acts and the degree of competition remaining in the market will all form part of the determination.

The Institutional Framework for Enforcement

The role of the Competition Bureau is to carry out inquiries under the *Competition Act* having regard to the public interest in competition. Under the *Act*, the Bureau does not have the authority to directly compel change in business behaviour. In order to do so, it must make an application to the Competition Tribunal and take on the role of a litigant. In the case of section 79, the Bureau must provide evidence to satisfy the Tribunal that all of the elements of the section are met and that a remedial order is warranted.

During the course of an inquiry, the Bureau will ordinarily present the parties with its concerns as to any contravention of the section. Parties whose conduct is the subject of inquiry are at liberty to propose an alternative means of dealing with the Bureau's competition concerns that does not necessitate an application to the Tribunal.

Where the Bureau has grounds for an application to the Tribunal, a number of options are available. The Bureau may litigate a contested application. Alternatively, cases may be resolved on a consent order basis where the firm or firms whose conduct is in question and the Bureau agree on a remedy to be submitted to the Tribunal for its approval.

Remedies

The abuse of dominance provisions provide broad powers of remedy to the Competition Tribunal. Where the Tribunal finds that the elements of section 79 are met, it may make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal concludes that a prohibition order may not be adequate to restore competition, it may make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

Although the Tribunal has wide latitude to impose remedies under subsection 79, the section also contains a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner.

Conclusion

The Competition Tribunal has rendered six decisions under the abuse of dominance provisions. These decisions provide jurisprudence on most of the key elements of section 79. However, there remain some areas such as joint dominance, vertical squeezing and potential

efficiency considerations on which little or no jurisprudence exists. Accordingly, the approach adopted by the Bureau in preparing these guidelines has been to both reflect the jurisprudence established under section 79 and to articulate the Bureau's enforcement position on aspects of the abuse of dominance provisions where there is no jurisprudence.

Enforcement Guidelines on the Abuse of Dominance Provisions (Section 78 &79 of the Competition Act)

Part 1 Overview of the abuse of dominance provisions

1.1 Purpose of the Guidelines

1. The provisions of the *Competition Act* ("the *Act*") dealing with abuse of a dominant market position are, together with merger review and criminal conspiracy prohibitions, one of the cornerstones of Canadian competition policy legislation. These guidelines are intended for the general public, business people and their legal and economic advisors so they can better understand the intent of the abuse of dominance provisions and the general approach taken by the Competition Bureau ("the Bureau") to enforce these provisions.

2. Since these provisions came into effect in 1986, there have been a number of decisions by the Competition Tribunal ("the Tribunal"). As a result, there is a body of jurisprudence from the Tribunal on the key elements of the abuse of dominance section. However, there still remain certain aspects of the law which the Tribunal has not yet had an opportunity to address in any of its decisions. The Bureau has therefore developed an enforcement approach for those aspects of the provisions where there is no jurisprudence available.

1.2 Organization of these Guidelines

3. These guidelines are organized into five parts and four appendices as follows: Part 1 provides an introduction and an overview of the evolution of the abuse of dominance

provisions; Part 2 sets out the institutional framework for enforcement of the provisions; Part 3, draws on the jurisprudence of the Competition Tribunal to provide a detailed discussion of the key elements of section 79; Part 4 discusses the anti-competitive acts as set out in section 78; and Part 5 deals with remedies available to the Competition Tribunal under section 79. In addition, there are four appendices: the first appendix contains the text of sections 78 and 79 of the *Competition Act* dealing with abuse of a dominant market position; the second provides an overview of the essential elements established in the case law; the third discusses the Bureau's approach to dealing with allegations of abuse of dominance in industries characterized by vertical integration and dual distribution; while the fourth provides a brief summary of the cases which have been decided by the Competition Tribunal.

1.3 The Purpose of the Abuse of Dominance Provisions

4. The enactment of the *Competition Act* in 1986 marked a significant change in the legislative treatment of monopolies and dominant firms. Prior to 1986, the *Combines Investigation Act* defined the term monopoly as a party or parties who substantially controlled a class or species of business and operated to the detriment or against the interest of the public. The *Combines Investigation Act* then created a criminal offence of monopoly, as it was defined in the legislation. No legislative guidance on the issue of detriment was provided. Without such guidance, establishing proof of detriment to a criminal standard of reasonable doubt was exceedingly difficult. Over time, it became clear that dealing with the issue of abusive exercise of market power under criminal law was inappropriate.

5. The 1986 legislation moved the review of the activities of dominant firms and monopolies into the realm of civil law. The section also clarified Parliament's intent that

simply being a dominant firm or even a monopoly, with the associated market power, is not in and of itself, sufficient to warrant competition law intervention. Charging higher prices to customers or offering lower levels of service and choice than would be expected in a more competitive market do not in and of themselves constitute an abuse of a dominant position.

6. Rather, the Competition Tribunal has determined that an abuse occurs when a dominant firm or group of firms engage in conduct that constitutes exclusionary, disciplinary or predatory behaviour towards other competitors or potential competitors with the result that competition is prevented or lessened substantially[1]. This distinction is critical as it is clear that the objective is to preserve competition within markets rather than to provide an umbrella of protection for individual competitors.

7. The objective of the abuse of dominance provisions is to create a 'level playing field' or a market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete. Providing a level playing field, however, does not mean establishing equality among competitors. Rather, the objective of the abuse provisions is to promote effective competition and not the interests of any one competitor or group of competitors. The provisions are not intended to be used to attempt to tilt the playing field in favour of market participants who, for example, lack the ability to compete with more efficient or better managed rivals.

8. Competition policy exists to encourage competition rather than to penalize efficient, well managed firms which engage in aggressive, but legitimate competitive behaviour. In all markets there will be some businesses which are better positioned than others to compete. Some may posses superior products, more efficient distribution methods, or

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[1]Director of Investigation and Research v. Nutra Sweet

marketing expertise. Firms may also employ different competitive strategies including varying degrees of vertical integration. It is part of the normal competitive process that some firms will succeed while others will fail. The abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour in order to damage or eliminate competitors and maintain, entrench or enhance their market power.

9. To reach a determination regarding any alleged breach of the abuse of dominance provisions, the circumstances of the industry and the particular facts of each case must be investigated and carefully analysed. For example, marketing practices employed by a firm with a relatively low market share in an industry with low or minimal barriers to entry would be unlikely to trigger an inquiry or much less an application to the Tribunal. However, identical marketing practices engaged in by a firm with a large share of the market in an industry with significant entry constraints could well trigger enforcement action by the Bureau. Therefore, in considering whether particular business conduct breaches the abuse of dominance provisions, it is necessary to evaluate the practices in question in the context of the structural and other characteristics specific to the market. In light of this, it is not possible in these guidelines to set out in advance and with precision hard and fast rules as to what would constitute an abuse of dominance in all situations. Nevertheless, the Bureau believes that by drawing upon the existing jurisprudence and its experience in enforcing the abuse of dominance provisions, these guidelines will play a role in enhancing compliance with the *Act* and provide additional clarity on how the Bureau will enforce the abuse provisions.

Part 2 Institutional Framework for Enforcement

2.1 Investigation and Adjudication

10. The *Competition Act* and the *Competition Tribunal Act*[2] create a clear separation between the functions of investigation and adjudication. The Commissioner of Competition[3] is charged with the responsibility for inquiries under the *Act* and is provided with significant powers with which to carry them out.[4] The Competition Tribunal is responsible for adjudication of the civil provisions of the *Act*, including the abuse of dominance provisions. [5]

11. Only the Commissioner can make an application to the Tribunal for a remedial order. Likewise, the Tribunal can only be seized of an issue under the *Act* when it has received an application by the Commissioner. When an application has been filed with the Tribunal, the burden of proof is on the Commissioner to satisfy the Tribunal that all of the elements of section 79 are met and that an order of the Tribunal should be granted.[6] In other words, the Commissioner cannot directly compel change in business behaviour. The Commissioner must take on the role of a litigant before the Tribunal and must produce evidence and prove that there are grounds for the making of an order.

2.2 The Examination/Inquiry Process

12. It is the duty of the Bureau to carry out inquiries on an impartial basis, having regard to

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[2] Both of these statutes came into force in June, 1986.

[3] Known prior to the amendments of the *Competition Act* in March 1999 as the Director of Investigation and Research

[4] The Commissioner of Competition is appointed by the Governor in Council and, as head of the Competition Bureau, is responsible for the administration and enforcement of the *Competition Act*.

[5] The Competition Tribunal is composed of judges of the Federal Court of Canada Trial Division, one of which is Chair of the Tribunal, as well as lay members with expertise in the fields of business and economics.

[6] The standard of proof required under the civil reviewable matters is 'on a balance of probabilities'.

the public interest in competition as opposed to effects on the private interests of market participants. Some complainants have misconstrued the purpose of the abuse of dominance provisions in an attempt to seek protection from the impacts of otherwise legitimate market competition or otherwise attempt to assure their firm a profitable position in the market. As indicated in Section 1.3 of these Guidelines, this is not what the section is intended to accomplish. The Bureau pursues those complaints which meet the elements of the section and where a substantive issue of prevention or lessening of competition exists.

13. An application by the Commissioner to the Tribunal is preceded by an investigation or inquiry by the Competition Bureau. Examinations under the *Act* typically commence with the receipt of a complaint. In abuse of dominance cases, complaints may be received from business firms who allege that the activities of their competitors are inhibiting their ability to enter or compete in a market.

14. Upon receipt of a complaint, the Bureau undertakes a preliminary examination to establish a factual basis to determine: i) whether there is an issue under the *Act*; ii) whether grounds to pursue a formal inquiry under the *Act* exist and; iii) to determine under what provisions of the *Act* the inquiry should proceed. The Commissioner may cause an inquiry to be made where the Commissioner believes that grounds exist for the making of an order under Part VIII, where the abuse of dominance provisions are found. Once the inquiry has commenced, formal powers of investigation may be used.[7]

15. Often, allegations of abuse of dominance can also be examined under other more specific

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[7] In addition to the authority of the Commissioner to commence an inquiry, section 9 of the Competition *Act* provides that six Canadian residents may apply to the Commissioner for an inquiry. In addition, section 10 provides for the Minister of Industry to direct the Commissioner to cause an inquiry to be made. However, the vast majority of inquiries under the Competition *Act* are initiated by the Commissioner where a complaint and preliminary examination provide the requisite "reasonable grounds to believe" that a breach of the *Act* has occurred.

civil and criminal provisions. Inquiries by the Commissioner can be broad enough to consider possible contravention of the *Act* under a number of sections[8]. A final determination of which sections of the *Act* the Commissioner will proceed with will depend on specific facts of the case. It should be noted, however, that one of the key features of the abuse of dominance provisions is the breadth of possible remedies which can be obtained through an order by the Competition Tribunal.

16. By using formal powers of investigation, the Commissioner may, with the prior authorization of the court, compel persons to provide the information required to complete the inquiry. Section 11 of the *Act* allows the Commissioner to obtain the production or written returns of documents as well as providing for an oral examination under oath of an individual. Section 15 provides for the search of premises and the seizure of evidence.

17. In the course of its inquiries, the Bureau will pursue various avenues of investigation necessary to obtain all relevant information. This normally includes information in the possession of complainants, third party market participants and the firm or firms which are the subject of the inquiry. This information is carefully analysed within the legal and economic framework of the legislation. Frequently, the Bureau will obtain specialized legal and economic advice or industry specific expertise as part of its case assessment process. Where the Bureau concludes that it has grounds for an application to the Tribunal, parties against whom an order would be sought are provided with a full opportunity to present information to the Bureau or to indicate what, if any, measures they may be prepared to undertake to address the Bureau's competition concerns.

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[8]For example, an allegation of abuse may involve predatory conduct (also covered under section 51 of the criminal provisions , the refusal to supply a customer which could be dealt with under section 75 or section 61 or exclusive dealing which along with market restrictions and tied selling can be dealt with under section 77.

18. The inquiry process is governed by a number of safeguards, checks and balances. Section 10(3) of the *Act* requires that all inquiries be conducted in private. In addition, the Commissioner can only exercise formal powers of investigation by obtaining the prior authority of the Courts to do so. The need to follow due process, the complexity of the issues, the volume of information and the degree of analysis required by the Bureau to make proper decisions on the disposition of inquiries combine to make the inquiry process both time consuming and resource intensive.

2.3 Disposition of Examinations/Inquiries

19. The final disposition of an examination, or an inquiry, will depend upon whether or not the evidence establishes that the elements of section 79(1) are present. If the Commissioner concludes that the evidence does not establish the elements of 79(1), the inquiry will be discontinued. The Commissioner then produces a formal written report to the Minister is of Industry indicating the information obtained and the reason for the discontinuance.[9] Where the Commissioner has grounds to do so, an application can be made to the Competition Tribunal. Part 5 of these guidelines discusses the remedies available under section 79 as well as alternative approaches to resolving competition concerns without resorting to litigation before the Tribunal.

2.4 The Competition Tribunal Process

20. Where the Commissioner concludes that grounds exist for an application to the Tribunal

[9] Section 22 governs discontinuances. In the case of inquiries commenced as a result of an application under section 9, the Commissioner is required to inform the 'six resident applicants' of the discontinuance and the reasons for it.

for a remedial order, an application may be filed on a consent basis[10]. This happens only when the respondent and the Commissioner agree to submit to the Tribunal a proposed remedy to address the competition problem. Where an agreement on a consent order has not been reached with the respondent, the Commissioner will file an application with the Competition Tribunal. Whether cases come before the Tribunal on a consent or contested basis, the rules of the Competition Tribunal provide for an open public hearing process in which affected third parties can apply for intervener status. Proceedings before the Tribunal follow established court procedures for the appearance of witnesses as well as the production of documentary evidence.

Part 3 The Elements of Section 79 (1)

3.1 Statutory Provision

Section 79(1) provides:

> "Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice."

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[10] Section 105 gives the Competition Tribunal the discretion to grant an order agreed to by the Commissioner and respondent firms without hearing the full evidence as it would in a contested proceeding. In proceedings commenced on a Consent basis, the Tribunal will only grant the order if it is satisfied that it is adequate to alleviate the substantial lessening of competition alleged by the Commissioner.

21. Thus, section 79 of the *Competition Act* sets out the three essential elements. Subsection (a) limits the application of the provisions to situations where one, or more firms can be shown to control the market(s) in question. This subsection clearly focuses the provisions on market power -- the concern that a firm or group of firms may be able to enhance or entrench their market power, or facilitate its exercise. The Bureau considers market power to be the ability to profitably maintain prices above competitive levels (or similarly restrict non-price dimensions of competition) for a significant period of time, normally one year. The law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Competition Tribunal. A dominant position from which a firm charges prices above the competitive level is not by itself grounds for an application under section 79. The abuse of dominance provisions are not intended to regulate prices, but rather to ensure that anti-competitive conduct is properly addressed.

22. Subsection (b) further qualifies the section by specifying that the provisions only apply to circumstances where market power (assuming it has been shown to exist) is used in an anti-competitive way. It is the abuse of a dominant position that gives rise to scrutiny under the *Act*. Illustrative examples of business practices that could constitute anti-competitive acts are provided in Section 78. The list of anti-competitive acts, although broad, is non-exhaustive. Accordingly, the Competition Tribunal has the latitude to address anti-competitive acts not defined in section 78 and has done so in a number of cases. In order to help differentiate between legitimate competitive activity and that which constitutes abuse within the meaning of section 79, the practices in section 78 all involve an element of purpose, object or design to undermine competition. Part 4 of this document provides more detail on these anti-competitive acts.

23. Finally, subsection (c) imposes a requirement of proof that the business conduct has had, is having or is likely to have, the effect of "preventing or lessening competition substantially." This places the focus squarely on adverse effects on competition, rather

than individual competitors.

3.2 The Elements

3.2.1 "One or more persons, substantially or completely control, throughout Canada or any area thereof, a class or species of business"

24. This subsection of the *Act* contains a number of elements that need to be separately defined: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and, (iii) whether "one or more persons" possesses control.

3.2.1(a) "Class or species of business" – Product Market Definition

25. A precondition for assessing market power is establishing existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The statutory language enacted in 1986 adopted the term "class or species of business" rather than the term "market" in the context of the control element. The Bureau approach is to consider defining a "class or species of business" as synonymous with defining a relevant product.[11] The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring. As in other areas of competition law, the examination then turns to determining whether competition from other product sources limits the ability of the firm(s) in question from exercising market power. The analysis focuses on whether there are close substitutes for the product(s) in question, such that buyers would turn to these substitutes in the event that the product price was raised above competitive levels by a significant amount for a non-transitory period of time. In general, a 5% real price increase above competitive levels lasting one year is considered a significant and non-

[11] *In Nutra Sweet* the Tribunal concluded that delineating a "class or species of business" is equivalent to defining a relevant product market.

transitory amount[12].

26. This approach was accepted by the Competition Tribunal in Laidlaw,[13] and later in Nielsen,[14] where the Tribunal set its basic approach to product market definition:

> Direct evidence of switching behaviour in response to small changes in relative price would provide proof of substitutability. Where price and quantity changes are not in evidence, as was true in the instant case, it is necessary to answer the question less directly by examining the evidence of both buyers and suppliers regarding the characteristics, the intended use and the price of [the product market in question].[15]

27. Price increases are not the only quantitative indicator used to define product markets[16]. Qualitative factors are also considered. The Bureau looks at many factors when determining the appropriate product and geographic market definition under the abuse of dominance provisions, these include:

- The views, strategies, behaviour and identity of buyers: whether buyers have substituted between products in the past and whether they plan on doing so in the future can provide an indication as to whether a price increase is sustainable;

- Trade views, strategies and behaviour: third parties knowledgeable about the industry in question may provide helpful information regarding historical and likely future industry developments that help define the relevant market;

- End use: functional interchangeability is generally a necessary, but not sufficient,

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[12]This is consistent with the approach for defining markets outlined in the Bureau's Merger Enforcement Guidelines

[13]*Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

[14]*Director of Investigation and Research v. The D&B Companies of Canada Ltd.* (1996), 64 C.P.R. (3d) 216 (Comp. Trib.).

[15]*Nielsen, Ibid.* at 241.

[16]There are a variety of quantitative techniques available including price correlation analysis, price elasticity analysis and diversion ratio analysis

condition that must be met for two products to warrant inclusion in the same relevant market;

- Physical and technical characteristics: in general, the greater the value that buyers place on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will be found to be in a distinct relevant market;

- Switching costs: the extent to which the transaction costs which buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures, etc., may be sufficient to render switching unlikely in response to a significant and non-transitory price increase; and,

- Price relationships and relative price levels: the absence of a strong correlation in price movements between two products over a significant period of time generally suggests that the products are not in the same relevant market. Similarly, whether the prices of one firm have historically constrained the price movements of another is an indication that the two firms' products compete in the same market.

3.2.1(b) "Throughout Canada or any area thereof" – Geographic Market Definition

28. An analysis of the universe of existing competition also has a geographic dimension. The Bureau considers the determination of "throughout Canada or any area thereof" as equivalent to defining the relevant geographic market. This is consistent with the jurisprudence. [17]

29. In addition to using some of the available quantitative techniques used in product market definition the Bureau also considers other qualitative factors when determining geographic market definition under the abuse of dominance provisions:

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[17] In *NutraSweet,* the Tribunal stated that the relevant geographic market will encompass "an area [that] is sufficiently isolated from price pressures emanating from other areas so that its unique characteristics can result in prices differing significantly for any period of time from those in other areas." *see supra* note 3 at 20-21.

- The views, strategies, behaviour and identity of buyers: whether considerations relating to convenience or the particular characteristics of the product (e.g. fragility, perishability) influence from where buyers are likely to make purchases in the event of prices rising above competitive levels;

- Trade views, strategies and behaviour: third parties knowledgeable about the industry in question may provide helpful information regarding historical and likely future industry developments that help define the relevant market;

- Switching costs: the extent to which the transaction costs which buyers would have to incur in order to retool, repackage, adapt their marketing, breach a supply contract, learn new procedures, etc., may be sufficient to render switching unlikely in response to a significant and non-transitory price increase;

- Transportation costs: in general, where prices in a distant area have historically exceeded or been lower than prices in the relevant geographic area by an amount which exceeds the transportation costs, this is usually an indication that the distant area is in a separate relevant market. However, this may not be conclusive, because the postulated significant and non-transitory price increase above competitive levels may elevate prices to a level above the distant price plus transportation costs. Where it is profitable for distant sellers to ship the product into the relevant market, it will generally be assumed that the supplier would likely do so;

- Price relationships and relative price levels: the absence of a strong correlation in price movements between two geographic areas over a significant period of time generally suggests that the regions are not in the same relevant market. Similarly, whether the prices of distant sellers have historically constrained the price movements of local sellers is an indication that the distant and local sellers compete in the same market;

- Shipment patterns: significant shipments from one region to another generally suggest

that the two regions are in the same geographic market. However, past trading patterns can be a poor indicator of the extent to which sellers in one area constrain sellers in another area, particularly where there is an absence of shipping; and,

- Foreign competition: while the above-noted principles apply equally to domestic and international sources of competition, there may be other considerations when examining the influence of foreign-based suppliers, including tariffs, quotas, regulations, antidumping complaints or duties, government procurement policies, intellectual property laws, exchange rate fluctuations, international product standardization, etc.

3.2.1(c) The Cellophane Fallacy

30. In defining both product and geographic markets in the context of allegations of an abuse of dominance, the Bureau will work on the assumption that dominance exists and that the prevailing market prices reflect this fact. What this means is that the current price in the market is higher than expected in a competitive market by virtue of the market power exercised by the dominant firm or group of firms. At price levels such as this , it is reasonable to assume that there may be products in the market that would not be there at price levels commensurate with a competitive market. To include these products in a market definition would effectively overstate the product market from an anti-trust perspective. This is because these products do not discipline the market but rather enter the market only at price levels which are higher than normally competitive levels. A similar situation occurs in defining the geographic parameters of the market. If the market is defined in terms of price levels reflecting a dominant player, the geographic parameters of the market will be overstated as they will include areas which could not be included in the market if competitive price levels prevailed. This problem associated with measuring markets where it is alleged that dominance prevails was first identified in the context of a case in the US involving the producers of cellophane. As a result, it is referred to as the cellophane fallacy.

31. Recognizing that market power exists, the Bureau will define the parameters of the product and geographic markets by first estimating what the approximate price level for the product would be in the abscence of market power. With this estimate, a more accurate definition of the relevant markets can be developed.

3.2.1(d) "Substantially or completely control" – Market Power

32. Once the universe of existing competitors is delineated, it is necessary to assess the extent to which these rivals constrain any market power that the dominant firm(s) might otherwise possess. The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.[18] Market power may also be defined with respect to a material, non-transitory reduction in other factors of competition such as service, quality, variety, advertising or innovation. For ease of reference, market power is referred to here with respect to price increases but should be understood to include also non-price factors of competition. The Bureau normally regards a "considerable" period of time for the purposes of establishing market power to be one year. This does not mean that the Bureau will not pursue an abuse of dominance case where the exercise of market power has been in place for less than one year. In instances such as this, there will be an analysis of the likelihood that this exercise of market power will continue if no intervention is made by the Bureau.

33. The Bureau recognizes that it is difficult to measure market power directly and, consequently, a number of indicia – both qualitative and quantitative – of market power are normally relied upon. These indicia include but are not necessarily limited to the following:

i) Market share, including share stability and distribution;

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[18] This approach was adopted by the Competition Tribunal in *NutraSweet* and by the Tribunal in *Laidlaw*, and *Nielsen*.

ii) Barriers to entry, including the conduct allegedly engaged in by the dominant firm(s);

iii) Other market characteristics, including extent of technological change, recent entry or exit, the extent of excess capacity, and customer or supplier countervailing power.

Market Share

34. A variety of factors are relevant to an assessment of whether a firm, or group of firms, has market power. The case law indicates that one of the most important factors, along with barriers to entry, is market share.[19] There is not, however, a definitive numeric market share that implies a firm has market power. The Bureau has adopted the view that high market share is a necessary, but not sufficient, condition to establish market power.

35. With the focus on control by a single firm, or group of firms, the purpose of the market power analysis is to concretely measure the extent to which existing competitors (identified above in the market definition exercise) and/or potential competitors (discussed in the section on entry barriers below) are likely to constrain any exercise of market power. When evaluating joint-control, the analysis requires consideration of the factors surrounding the scope and the nature of the coordination of the group of firms who jointly control the market.

36. All other things being equal, the larger share of the market held by remaining competitors, the less likely that the firm, or group of firms, in question would have been, or would be, able to exercise market power. Where remaining competitors have a large

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[19] In *NutraSweet supra* note 3 at 28, the Tribunal states: "While this [the ability to set prices above the competitive level] is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control will vary from case to case".

market presence, there exist a larger number of competitive alternatives available for customers to turn to if a firm or group of firms attempts to increase price. Defection of a significant fraction of a firm's customer base may be enough to make an increase in price above competitive levels unprofitable.[20]

37. In the contested abuse of dominance cases heard to-date,[21] the market shares of the dominant firms were at or near-monopoly levels. This suggests that, in these instances, customers had very few alternatives to choose from in the event that the dominant firm increased price above competitive levels or otherwise lessened competition substantially[22]. In *Tele-Direct,* the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a *prima facie* determination of control based on market shares of 80 % and higher in local telephone directory advertising markets. In *Laidlaw*, the Tribunal observed that a market share of less than 50 % would not give rise to a *prima facie* finding of dominance, but this does not imply that market power could never be found below 50 %.

38. The Bureau considers that a market share of less than 35 % will normally not give rise to concerns that a firm has engaged or is engaging in a practice of anti-competitive acts that is preventing or lessening competition substantially in a market. If a firm has over 35 % market share the Bureau will normally continue its investigation. .

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[20]The intensity of competition between existing rivals in a market is also relevant since switching by customers that have an incentive to switch may require output expansion by outside firms. At one extreme, which is modelled in the economics literature assuming that firms compete in price strategies, rivals are assumed to be able to provide a competitive alternative at a given price to all customers that have an incentive to switch. At the other extreme, which is modelled in the economics literature assuming firms compete in output strategies, rivals are assumed to expand output and thus provide a competitive alternative for a fraction of customers of the dominant firm as the market price increases.

[21]The cases are: *NutraSweet, Laidlaw, Nielsen* and *Tele-Direct.*

[22]NutraSweet supplied 95% of the aspartame market in Canada. Laidlaw was found to have market shares between 87% and 100% in various commercial waste collection markets. Nielsen had 100% market share of the market for scanner-based market tracking services, providing a *prima facie* finding of market power, or control, that required evidence of the absence of barriers to entry for rebuttal.

39. The two cases involving joint dominance[23] were dealt with under a consent order where the element of joint dominance was taken as a given. As a guide, the Bureau will consider market shares of the dominant group in the range of 60 to 65 % to reflect a *prima facie* finding of joint dominance.

40. In addition to the dominant firm's market share, the distribution of the remaining market across competitors is also relevant. Other things being equal, the likelihood that a firm may be able to sustain prices above competitive levels increases with its market share, and as the disparity between its market share and the market shares of its competitors increases. Thus, all else being equal, the ability of a single firm holding 55% of a relevant market to exercise market power may be very different in a situation where it faces one other competitor with a 45% share compared to a disparate group of smaller rivals, no one of which has a share larger than 10%.

41. In summary, the Bureau's general approach with regards to market share is as follows:

–A market share of less than 35% will generally not give rise to concerns of market power or dominance;

–A market share over 35% will generally prompt further examination;

–A market share greater than 50% in the case of a single firm will *prima facie* be considered dominant. In the case of a group of firms alleged to be jointly dominant, a combined market share of the group which exceeds 60 to 65% will prompt further examination.

Barriers to Entry

42. As noted above, high market share, even at monopoly levels, is not in itself sufficient to

[23] Interac and Canyps

prove market power. Absent barriers to entry, any attempt by a dominant firm to exercise market power is likely to be met with entry or expansion of existing firms such that the dominant firm loses a sufficient number of customers to its rivals so that it is not profitable to attempt to raise prices above competitive levels. In general, entry is likely to be delayed or hindered by the presence of absolute cost differences between the incumbent and the entrant, or the need to make investments that are not likely to be recovered if entry is unsuccessful. These investments are referred to as sunk costs. As noted by the Tribunal in *Laidlaw*, "'barriers to entry' is a term of art which carries with it the connotation of sustainability".[24] An entrant must not only be able to enter but be able to become a viable competitor.

43. As the market shares of the dominant firm(s) rises, the jurisprudence articulates a relationship between market shares and the standard of proof that will be used in assessing barriers to entry. This is noted by the Tribunal in both *Nielsen* and *Tele-Direct*. In *Tele-Direct*, where market shares were 80% or higher, the Tribunal stated that it would require evidence of "extenuating circumstances, in general, ease of entry" to overcome a *prima facie* determination of control.[25]

44. Examples of the issues considered in entry analysis in past Tribunal cases include the following. In *NutraSweet*, the Tribunal found that barriers to entry into the aspartame market were high because of process patents associated with producing aspartame held by incumbents (the patent for aspartame has now expired in Canada), significant economies of scale and sunk costs, and a long start-up time of around two years. In *Laidlaw*, the Tribunal found that barriers to entry into the commercial waste collection industry were not generally high, however, the various contracting practices engaged in by Laidlaw had the effect of raising barriers of entry. In *Tele-Direct*, the Tribunal concluded that barriers to entry, aside from targeted "niche" entry, to the telephone

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[24] *Laidlaw*, *supra* note 6 at 74.
[25] *Tele-Direct*, *supra* note 2 at 83.

directory market were significant, given the requirement of significant sunk costs and the reputation of the incumbent, as well as the incumbent's affiliation with telephone companies.

3.2.1(e) "One or more persons" – Joint dominance

45. The wording of the *Act* clearly contemplates cases where a group of unaffiliated firms may possess market power even if, for example, no single member of the group is dominant by itself. In joint dominance cases, there are three sources of competition that can defeat the profitability of a price increase. These are: (1) competition from existing rivals outside the allegedly jointly dominant group; (2) competition from potential rivals (i.e. entrants) outside the allegedly jointly dominant group; and (3) competition from within the allegedly jointly dominant group. Given this, an additional element of proof is necessary to establish control, or market power, by more than one firm as compared to the case of a single dominant firm.

46. The jurisprudence provides only limited insights into the additional evidence necessary to establish control by a group of firms. To date, there have only been two cases involving joint dominance under the *Competition Act*.[26] In both instances, the fact that joint dominance existed was taken as a given and supported by the existence of an explicit agreement.

47. Economic theory indicates that a group of firms that collectively possesses market power may be able to coordinate their actions in a manner that allows the market price to be profitably increased above the non-coordinated price levels without entering into an explicit agreement. The theory is premised upon the notion that firms within an oligopoly will base their decisions on how their rivals have behaved in the past. In addition, firms recognize that their current decisions may affect their rivals' future

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[26] Interac and CANYPS

reactions. The fact that firms recognize these interactions, over a longer time period, results in competitive response strategies becoming more complex. It is possible for firms to act in a "consciously parallel" fashion thereby achieving higher profits than would be the case in a competitive environment. Indeed, the economics literature indicates that there is little distinction between explicit and implicit agreements, except for the case where the former can be enforced through the courts.

48. The jurisprudence in respect of the criminal conspiracy provisions is clear in not condemning "conscious parallelism".[27] The Bureau has adopted a similar position with respect to the abuse provisions, recognizing that something more than mere conscious parallelism must exist before reaching a conclusion that firms are acting in some form of coordinated activities.

49. In principle, the ability of a group of firms to coordinate their actions without entering into an explicit agreement can be addressed under the abuse provisions. To infer control by a group of firms the Bureau will consider the following:

a) Whether the group of firms collectively account for a large share of the relevant market.

b) Any evidence that the alleged coordinated behaviour is to increase price or engage in some form of anti-competitive act.

c) Any evidence of barriers to entry into the group as well as barriers to new entrants into the relevant market.

d) Any evidence based on the particular facts of the case that actions have

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[27] See *R. v. Canadian General Electric* (1974) 17 C.C.C. (2d) 433 and *R. v. Armco* (1974) 21 C.C.C. (2d) 129.

been taken by members of the group to inhibit intra-group rivalry.[28]

e) Any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

3.2.2 "Have engaged or are engaging in a practice of anti-competitive acts"

50. The second element of the abuse of dominance provisions examines whether "that person or those persons have engaged in or are engaged in a practice of anti-competitive acts". As noted above, the law does not imply that the mere existence of market power will give rise to grounds for a remedial order by the Competition Tribunal. Subsection 79(1)(c) provides that substantial or complete control (assuming it has been shown to exist) only raises competition issues when it is used in a manner that lessens or prevents competition substantially – it is the abuse of a dominant position that gives rise to scrutiny under the *Act*.

51. Subsection 79(1)(b) can be usefully divided into two parts. The first part of the subsection involves showing that there is or has been "a practice". The second part of the subsection requires that it be shown that there is an anti-competitive act(s). In regard to the latter part of the element, illustrative examples of business practices that could constitute anti-competitive acts are provided in section 78 (see Appendix I).

3.2.2(a) Practice

[28] Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination and its subsequent punishment. At the same time, however, such practices may be adopted for business reasons (such as providing price information to consumers or protecting incentives for relation-specific investments) that are unrelated to coordinated conduct. It is necessary to consider the rationale and likely effects of such practices before they are considered as evidence of joint control.

52. The term "practice" was considered in the context of single firm dominance in the *NutraSweet* case. In this case, the Tribunal adopted a broad view of the term and established that different individual anti-competitive acts taken together may constitute a practice.[29]

53. The Bureau considers that while a practice is normally more than an isolated act, it may also constitute one occurrence that is sustained and systemic or that has had a lasting impact on the state of competition. For example, a long-term exclusionary contract may effectively prevent or lessen competition even though the contract itself only constitutes one episode of an anti-competitive act. In joint abuse cases, an assessment of whether the anti-competitive act(s) are sustained and systemic, or have a lasting impact on the state of competition, would need to consider the pattern of business conduct by several firms.

54. The wording of the statute clearly indicates that the negative effects on competition may be past, present or future effects. A remedial order may be sought in respect of past practices. However, under section 79(6) the Commissioner cannot bring an application before the Competition Tribunal with regards practices which have ceased for three years or more.

3.2.2(b) ***Anti-competitive acts***

55. Section 78 of the *Act* provides a non-exhaustive list of anti-competitive acts. In addition to these acts, there is some jurisprudence on anti-competitive acts not listed in section 78. The acts in section 78 all lessen competition when engaged in by a dominant firm for an anti-competitive purpose. The Tribunal tests for anti-competitive purpose by asking whether an act is done for a predatory, exclusionary or disciplinary

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[29] *NutraSweet*, *supra* at 35.

reason.[30] The purpose or intent of the act may be proven by an inference or a conclusion to be drawn from the facts established as evidence. The verbal or written statements of the personnel of a company are likely to establish subjective intent. Consideration of the act itself may lead to infer a purpose because persons are said to intend the necessary and foreseeable consequences of their acts. As the Tribunal noted in Nutrasweet,[31] in most cases the purpose of the act will have to be inferred from the circumstances surrounding it.

56. An issue arises when it can be established that there are competing purposes behind an act or acts which are both pro and anti-competitive. In the *Laidlaw case*, the Tribunal considered claims made by Laidlaw that the intent behind the activities in question was for efficiency enhancing purposes. The Tribunal did not accept these claims as being bona fide. This leaves an unanswered question of what would the Tribunal do in situations where an act had both anti-competitive and pro-competitive consequences. Section 79 does not, as in section 96 of the mergers provisions, provide for an explicit efficiency trade-off in assessing acts which are considered to be anti-competitive. However, the Tribunal has demonstrated that it is willing to consider claims of pro-competitive intent. In situations where the Bureau is satisfied that an anti-competitive act has been established and that this act has met the threshold of substantially lessening or preventing competition in a market, but the party or parties to the act maintain that this act was intended for the purposes of achieving some pro-competitive outcome, the Bureau will bring the matter before the Tribunal.

3.2.3 "The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market"

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[30] *NutraSweet, supra* at 34.
[31] *NutraSweet, supra* at 35.

57. The requirement of "preventing or lessening competition substantially in a market" puts the focus on the actual impact on competition rather than competitors. As the Tribunal noted in *Tele-Direct*, "seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the market are made better off."[32]

58. The meaning of "lessening competition substantially" is established in the case law. The Tribunal in *NutraSweet* stated that "In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC [NutraSweet] preserve or add to NSC's market power."[33]

59. The preservation and/or enhancement of market power can be achieved in a number of ways. The following sets out a non-exhaustive approach that the Bureau will follow in assessing the effect on competition of various types of anti-competitive acts.

The Strength of Competition in the Relevant Market

60. In determining whether a substantial lessening or prevention of competition has occurred as the consequence of a practice of anti-competitive acts, the Bureau will look at the overall state of competition in the relevant market(s). If the dominant firm or group of firms are not subject to significant effective competition at the time they engage in a practice of anti-competitive acts, the negative impact on the market arising from the practice of anti-competitive acts need only be incremental for it to be considered substantial, compared to a market which exhibits greater competition or lower entry barriers.

Anti-competitive Acts which Enhance or Maintain Barriers to Entry or Expansion

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[32] *Tele-Direct, supra* at 196.
[33] *NutraSweet, supra* at 47.

61. One means of maintaining or enhancing market power is to erect barriers to entry[34] or to expand, inhibiting potential competitors from challenging the market power of the dominant firm. In examining anti-competitive acts which involve the creation or enhancement of barriers of this type, the Bureau will focus its analysis on determining the state of competition in the market in the absence of these acts. If it can be demonstrated that but for the anti-competitive acts, an effective competitor or group of competitors would emerge within a reasonable period of time to challenge the dominance of the firm(s), the Bureau will conclude that the acts in question constitute a substantial lessening or prevention of competition. In assessing the potential to provide effective competition with the removal of the anti-competitive acts, the Bureau considers a reasonable time period to be two years, consistent with the time frame considered acceptable for entry into a market[35].

Part 4: Anti-Competitive Acts: Section 78

4.1 The Economics of Anti-Competitive Acts

62. The Competition Tribunal has, in the Nutra Sweet decision, made it clear that anti-competitive acts involve actions which are either predatory, exclusionary or disciplinary in nature. The Bureau's approach in assessing potentially anti-competitive activities is consistent with the Tribunal s interpretation but focuses on determining whether the activities in question fall into one or more of the following categories: (i) acts that raise rivals costs (or reduce rivals' revenues) or foreclose existing or

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[34]In the *Laidlaw* case, the Tribunal concluded that Laidlaw's acquisition of 100% of the market in some instances, along with the exclusivity provisions and litigation threats that raised barriers to entry, lessened competition substantially. In *Nielsen*, the Tribunal noted that Nielsen's contracts with its customers were long-term and came up for renewal on a staggered basis; an entrant could not obtain the access to a broad supply of data required for effective entry. The Tribunal found that the practices lessened competition substantially.

[35]This two year time frame is consistent with the approach to analyse barriers to entry adopted in the Bureau's *Merger Enforcement Guidelines*.

potential rivals from key inputs or facilities; (ii) predatory conduct, and (iii) acts intended to facilitate co-ordinated behaviour among firms (facilitating practices).

63. Many of the actions described in section 78 may be undertaken by a dominant firm without resulting in a substantial lessening of competition. For example, vertical acquisitions, discussed in section 78(b), can be pro-competitive because the newly integrated firm becomes a more efficient and effective competitor. Similarly, the introduction by a dominant firm of a new brand in response to entry, described in section 78(d), may well be a competitive response.[36] Therefore, in each abuse of dominance case, once it has established that a dominant firm has engaged in acts that fall under section 78, or other acts that are potentially anticompetitive, the Bureau will consider whether these acts will result in a substantial lessening of competition.

4.2 Raising Rivals' Costs and Market Foreclosure

64. A dominant firm may undertake a number of strategies that raise the costs of a rival, rendering the rival a less effective competitor. By increasing certain costs of a rival, the dominant firm can have the effect of inducing the rival to raise its prices, allowing the dominant firm to profitably increase its own prices. This strategy will be profitable provided the ultimate increase in price raises the dominant firm's revenues sufficiently to offset the costs of the strategy. Similarly, the dominant firm may also undertake a number of strategies that have the effect of eliminating existing competitors from the market or of deterring entry by excluding current or potential rivals from the inputs

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[36] An example of the pro-competitive potential is found in the Tribunal's decision in *Tele-Direct*. The Commissioner had alleged that Tele-Direct had abused its dominant position by aggressively targeting rivals in markets where entry into the telephone directory services market had occurred. The Commissioner contended that Tele-Direct used its significant profits in other markets to subsidize intense, "near-predatory" competition in those markets involving entry. In rejecting this contention, the Tribunal stated that "targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not."

necessary to compete. This may involve raising a rival's costs to the point where the rival is unable to remain in the market, but may also include pre-empting key facilities to deter entry. Again, such a strategy will be profitable for the dominant firm provided the costs of the strategy are offset by the ultimate increase in revenue, or by the prevention of lost revenues due to entry.

65. Section 78 describes various means by which a dominant firm can raise its rivals' costs or exclude a rival from inputs or facilities. Section 78 (a) describes vertical margin squeezing, premised on the ability of the dominant firm(s), operating at two levels of the distribution system, to raise the price of an input to a competitor operating only at the downstream level. This is commonly known as a "price squeeze", and may increase rivals' costs. However, this is only an enforcement concern when it not only harms competitors but also competition. Vertically integrated firm(s) may be more efficient in distribution than non-integrated firms. As a result, it may be difficult for a non-integrated firm to compete with an integrated firm in the downstream market for reasons that have little to do with squeezing. For more discussion on this topic refer to Appendix III.

66. Section 78(b) describes the acquisition by a customer of a supplier that would otherwise be available to a competitor of the customer, or the acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, for the purposes of impeding or preventing a competitor's entry or eliminating a competitor. Acquisition of a supplier by a dominant firm can allow the dominant firm to raise the price a rival must pay to obtain a key input. Alternatively, acquisition of a supplier can allow the dominant firm to deny access to the products produced by the newly acquired supplier, requiring a rival to purchase inputs from other suppliers at a higher price. Acquisition of a supplier can, through raising a rival's costs, make it a weaker competitor, and may even exclude a rival from the market. Acquisition of a supplier can also have the effect of prohibiting entry, by denying entrants inputs needed to

compete. (Acquisition of a customer by a supplier is dealt with in section 4.2.1 below).

67. Section 78(e) identifies the pre-emption of scarce facilities or resources required by a competitor as an anti-competitive act. For example, the dominant firm(s) may be able to bid up the price of a scarce input to the point where entry is unprofitable. Such a strategy may be profitable to the dominant firm(s) despite the higher price it also pays for the input because it avoids the dissipation of profits that entry would bring. Alternatively, the dominant firm(s) may raise its rival's costs by pre-empting low cost inputs, forcing the rival to use higher cost inputs. Even if this strategy did not result in the exit of the rival, it could be profitable for the dominant firm if it resulted in the rival being a less effective competitor, allowing the dominant firm to increase its own prices. Pre-emption could also take the form of acquisition or control of the supply of a necessary input in production, such as production sites or facilities that are not easily replicated.

68. Similarly, section 78(f) describes buying up a product to prevent the erosion of price levels. When applied to a wholesale or input market, such behaviour could have the result of raising rivals' costs by increasing or maintaining the prices at which the rival must purchase its inputs.

69. The same result can be obtained by the dominant firm requiring or inducing a supplier not to supply a rival, behaviour described in 78(h). This can result in increasing the price at which the rival purchases its inputs, and may exclude the rival from the market completely. Effective exclusion may result from exclusive dealing contracts or from contractual practices that create exclusivity. The *Nielsen* case, for example, involved exclusive dealing. Retailers agreed to sell scanner-based data to Nielsen only, which, in combination with a number of other factors, foreclosed entrants from participating in the scanner-based tracking services market.

70. Other contractual practices that may effectively create exclusivity include requirements contracts which set out that a party must purchase all their requirements from a particular vendor. A "meet-or-release" clause may also work to discourage a potential supplier from seeking to sell to a buyer because the potential supplier anticipates that the current suppliers will match the price. A most-favoured-nation ("MFN") clause, which requires the seller to give a buyer the best price it offers to any other customer, could also result in exclusivity[37]. Such contractual practices can also aid a dominant firm in excluding competitors by keeping the dominant firm informed about attempted entry or any actions of its rivals.

71. Although not specifically listed in section 78, refusal to allow access to an incumbent's facility by a competitor, or the imposition of restrictive terms of access, can constitute an anti-competitive act. Such refusal would be of concern primarily in deregulated industries in which, as a result of deregulation, a single firm possesses the network or facilities necessary for operation in a market. By refusing to grant access to the facility or granting access only on onerous terms, the dominant firm may severely limit the ability of competitors to enter newly deregulated markets, thereby foreclosing entry. Refusal of access is less likely to be of concern when the facility has been built by an unregulated dominant firm expressly as an investment allowing it to serve a market, and where a competitor could reproduce the facility for the same cost. As well, cases involving access to a distribution network constructed by the dominant firm are less likely to be of concern.

4.2.1 Access to Consumers - Reducing Rivals' Revenues

72. In addition to excluding a rival from access to necessary inputs or facilities, a dominant firm can engage in activities that limit a rival's or potential entrant's ability to attract

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[37]For example, in *Nielsen*, sellers of retail-scanner data agreed to an MFN clause which effectively committed the sellers not to sell the data to any other buyer since another firm (as a duopolist) would not have been able to pay as much for the data as Nielsen (as a monopolist).

customers. A dominant firm can implement technology, contracts, or other practices that make it costly for a customer to switch to an alternative supplier. By fostering such switching costs, a dominant firm may be able to foreclose entry or limit the expansion of a competitor.

73. Section 78(g) describes a dominant firm that adopts product specifications that are incompatible with the products of a rival. Such incompatibility can have the effect of limiting the number of customers willing to purchase from the rival. Similarly, long term contracts with automatic renewal provisions may create switching costs, foreclosing entry. An exclusive buying arrangement with even a subset of the consumers may foreclose entry if, as a result, an insufficient number of customers are available to an entrant to justify entering[38]. Alternatively, acquisition of a customer by a supplier, as described in Section 78(b), may foreclose entry by excluding a potential competitor from sufficient customers to make entry profitable.

74. Abuse of judicial processes may create switching costs, decreasing a rival's demand. In *Laidlaw*, Laidlaw apparently threatened both its customers and its rivals with litigation. Customers contemplating switching suppliers were on occasion told by Laidlaw that it would sue them for breach of contract as it had done to other customers. In fact, there was no evidence that Laidlaw had ever brought suit. Rivals contemplating servicing

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[38]In *NutraSweet*, the Commissioner alleged that NutraSweet had engaged in a practice of anti-competitive acts by using its U.S. patent on aspartame to exclude rivals from Canada. The Tribunal found that NutraSweet had persuaded a Canadian customer of aspartame to switch from a rival, Tosoh, to NutraSweet by offering rebates to the customer on the basis of aspartame used in products manufactured in the U.S. and imported into Canada. The rebate would depend on the difference between the U.S. and the Canadian prices. The Tribunal held, among other things, that the fact that NutraSweet was willing to offer the rebate regardless of the size of the U.S.-Canada price differential indicated an intention to limit the expansion of its competitors. It held that the use of the monopoly position conferred by the U.S. patent for anti-competitive purposes was an anti-competitive act. This illustrates an example where a rebate, which otherwise would be pro-competitive, would not be profitable but for the fact that it prevented the expansion of NutraSweet's rivals. In *Tele-Direct*, the dominant supplier of business telephone directories, Tele-Direct, induced a supplier of a product called "audiotext" to withhold supply from competing directories. Audio text was a service providing information, such as the news and weather, which competing directories had linked to their products. The Tribunal observed:
"[T]he only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which s. 79 is meant to guard"

Laidlaw's customers were also threatened with actions for inducing breach of contract. The Tribunal found that this behaviour constituted a practice of anti-competitive acts.

4.3 Predatory Conduct

75. It is difficult to distinguish predatory pricing and competitive pricing since both, at least initially, involve lower prices. Predatory pricing necessarily involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is characterized by high barriers to entry. Without such barriers, any price increase by the dominant firm(s) post-predation would simply attract entry so that the dominant firm(s) would not be able to raise prices and recoup the costs of predation. In such circumstances, it is unlikely that the firm(s) would engage in predation in the first instance.

76. Predatory pricing is often described as selling at a price below some measure of cost in order to harm a competitor. Predatory pricing can be profitable to the dominant firm, and hence harmful to competition, if the dominant firm is able to maintain or enhance market power as a result, thus allowing it to recoup the losses from the predatory campaign. This could be achieved by eliminating a rival, if entry barriers would prohibit potential entrants from constraining the dominant firm from increasing prices post-predation. In the absence of such barriers, predation may be profitable if it deters potential competitors from entering the market, for fear of a repeated predatory episode. Such a reputation for predation may also deter entry in other markets in which the dominant firm operates, increasing the incentives to engage in predation.

77. Dominant firms can also engage in predation in order to discipline competitors who have undertaken to challenge the market power of the dominant firm. The intent of disciplinary actions is to convince the target of the actions to cease a particular practice rather than to eliminate or exclude the competitor from the market. The net result on competition can be the same as elimination of a rival, if the disciplining results in the

elimination of the competitive threat of the target. Consider the example of a competitor seeking to obtain market share by lowering its prices. The dominant firm reacts by engaging in a predatory pricing strategy, not aimed at eliminating the competitor but rather, at compelling the competitor to resume pricing at previous levels.

78. In considering a case of alleged predatory pricing, the Bureau will adopt a two stage approach. In the first stage, the Bureau will examine whether the dominant firm would eventually be able to recoup the costs of the lower prices by raising prices later on by a significant and non-transitory amount, or by maintaining high prices in other markets. The ability to recoup normally requires that barriers to entry and expansion in the market are high. However, the Bureau will also consider the extent to which the act of predation will deter entry through establishing a reputation for predation.

79. Once the Bureau concludes that recoupment is likely, it would consider whether the dominant firm is pricing below some measure of its costs. The importance of such a price-cost comparison was emphasized by the Tribunal in NutraSweet.[39] In conducting such price-cost comparisons, the Bureau will include in its measure of costs all costs that are avoidable. That is, the Bureau will consider any costs that could have been avoided by not offering the product or service in the relevant time frame.

80. Several of the acts listed in Section 78 describe predatory behaviour. Section 78(i) refers to a potential anti-competitive act involving the dominant firm(s) selling "articles at a price lower than acquisition cost for the purpose of eliminating or disciplining a competitor". While section 78(i) clearly describes a form of predatory pricing, it is limited by its reference to "articles" and "acquisition cost." In NutraSweet, the Director attempted to apply section 78(i) to a manufacturer selling its product below its manufacturing cost. The Tribunal rejected this as not applicable to manufacturing situations where there is not a purchase and resale of articles.[40] The Tribunal made it clear, however, that predatory pricing could generally be an anti-competitive act for the purpose of section 79.

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[39] *NutraSweet, supra* at 43.
[40] *NutraSweet, supra* at 43.

81. A variant of predatory pricing may be found in section 78(c) (ie. freight equalization), which occurs where a firm bases freight charges on the distance of a customer from the rival's plant, as opposed to the distance from the dominant firm's own plant. By using the rival's plant as a basing point, the dominant firm(s) effectively earns a lower margin on customers located near its rival as compared to customers located near its own plant. This could amount to selective price cutting, that is, price cutting to buyers most likely to deal with the dominant firm(s)' rival(s), with predatory intent.

82. Section 78(d) indicates that the introduction of "fighting brands" may be an anti-competitive act. Fighting brands refer to brands introduced by a firm to inflict harm on a rival, either to limit or eliminate the rival's competitive significance, or to seek to punish temporarily a rival for competing too vigorously. Such brands are typically designed to be close competitors of the product or services produced by the rivals. For example, a dominant firm may open the retail outlets of a fighting brand near the retail outlets of a rival. Similarly, a dominant firm may adopt product specifications for a fighting brand that are similar to those of a rival. Because fighting brands are designed to provide a product or service that is similar to that provided by the rival, they can be especially effective when used as part of a predatory strategy. Fighting brands were central to the Eddy Match case, where Eddy Match was found to have introduced new brands of matches intending to eliminate entry to the wooden match market.[41]

4.4 Facilitating Practices

83. Facilitating practices enhance the ability of firms to coordinate their behaviour in order to increase or maintain prices. That is, facilitating practices are employed by a group of firms to ensure cooperation of the group members which is required to sustain the group's joint dominance in the relevant market(s). Typically, such practices assist firms in monitoring each other to ensure that no one "cheats" on an arrangement, or allow firms to more effectively punish such deviations.

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[41] *R. v. Eddy Match Co. Ltd.* (1954), 20 C.P.R. 107 (Que. C.A.).

84. Examples of facilitating practices that allow firms to more effectively monitor members of the group include pre-announcing price increases, or publicizing price lists. Delivered pricing can also be a facilitating practice. Delivered pricing can involve uniform delivered prices, by which firms charge the same delivered price to all customers regardless of location. Alternatively, firms can adopt the same basing-points from which transportation costs are added. Both forms of delivered pricing simplify price lists and result in customers facing the same price from each firm, thus making pricing more transparent to other firms and facilitating coordinated behaviour.

85. Contractual arrangements can also be used to enhance transparency and also to allow for more effective punishments. "Meet-or-release" clauses can alert a firm to price-cutting by other firms, thereby facilitating detection of deviations. Such clauses also allow for punishment by allowing the firm to match the offer, thus preventing the price-cutter from making the sale. Similar practices incorporate stronger punishments, such as a promise by a firm to beat any rival's price by 10%. MFN clauses effectively commit a firm to punishing itself for offering a selective price cut to a particular customer, since that price cut would have to be offered to all customers with MFN clauses. Thus, MFN clauses can deter selective price cuts and stabilize interdependence among oligopolists.

Part 5 - Remedies

5.1 Alternative Case Resolutions

86. If the Commissioner is satisfied that the evidence supports an application to the Competition Tribunal, a number of options to remedy the situation are available. During the course of an examination or an inquiry, the Commissioner will present to the parties any preliminary concerns regarding the alleged contravention of the *Act*. The parties are afforded the opportunity to respond to the Commissioner's concerns and, at anytime during the course of an examination or inquiry, can propose an alternative means of dealing with the Commissioner's concerns that does not necessitate an application to the Tribunal.

87. It should be noted that in most circumstances, the Commissioner's preference would be to have any proposed remedy agreed upon by the parties to be reviewed by the Competition Tribunal pursuant to a consent order application. However, each matter will be dealt with on a case-by-case basis. Where a party whose conduct is the subject of an examination or inquiry, voluntarily changes its business practices in a manner which addresses the Commissioner's concerns, the Commissioner may exercise discretion not to litigate the matter before the Competition Tribunal. In appropriate circumstances, where a party has addressed the Commissioner's concerns, this may be sufficient for the Commissioner to discontinue the examination or inquiry.

88. In instances where an alternative (to litigation) case resolution has been adopted to resolve the competition issues, the resolution of the matter will be made public by the Commissioner to ensure that the process remains transparent and that all interested parties have been informed of the fact that, and the means by which, the matter has been resolved.

5.2 Orders of the Competition Tribunal

89. The abuse of dominance provisions provide broad powers of remedy to the Competition Tribunal. Where, on application by the Commissioner, the Tribunal finds that the elements of section 79 are met, it may, pursuant to subsection (1), make an order prohibiting a respondent firm or firms from engaging in the practice of anti-competitive acts. In addition, or alternatively, if the Tribunal finds that an order prohibiting the continuance of anti-competitive practices is not likely to restore competition in the affected market, it may, pursuant to subsection (2) make an order directing any such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice of anti-competitive acts.

90. Section 66 of the *Act* sets out the penalties associated with failing to comply with an order issued by the Competition Tribunal. Any person who contravenes or fails to comply with such an order is guilty of an offence and liable on conviction of an indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to

both; or on summary conviction, to a fine not to exceed $25,000 or to imprisonment for a term not to exceed one year or to both.

5.3 Limitations and Exceptions

91. Although the Competition Tribunal has wide latitude to impose remedies under subsection 79(2), subsections 79(3) to 79(7) contain a number of limitations, exceptions and clarifications with respect to orders of the Tribunal and applications by the Commissioner. These provisions are briefly described below:

5.3.1 Subsection 79(3)- *rights of any person*

92. This subsection places a limitation on the scope of an order under subsection 79(2) to provide for an additional safeguard that protects the rights of persons against whom an order is directed. The intent here is to have an order that is aimed at restoring competition and not one that goes beyond achieving this objective. In other words, the order should be remedial and not punitive. The subsection stipulates that the scope of the order should not interfere with the rights of a person against whom the order is sought more than is needed to restore competition. This restriction is intended to protect existing private contractual relationships between persons, and other proprietary property such as trade secrets, unless a breach of these contracts or secrets is absolutely necessary to restore competition.

5.3.2 Subsection 79(4)-*superior competitive performance*

93. This subsection is intended to compel the Tribunal to consider whether the lessening of competition is attributable to the superior competitive performance of the dominant firm or firms. It does not call upon the Tribunal to balance superior competitive performance against the effects of anti-competitive acts[42]. Superior competitive performance is only a

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[42]This is quite different from section 96 of the merger provisions which calls for a balancing of efficiency gains with any substantial lessening or prevention of competition resulting from the merger.

factor to be considered in determining the cause of the lessening of competition and not as a justifiable goal for engaging in the anti-competitive act. Having lower costs, better distribution or production techniques or a broader array of product offerings can put a firm at a competitive advantage which when exploited will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the *Competition Act* is designed to preserve and , where possible, enhance as it ultimately leads to a more efficient allocation of resources.

5.3.3 Subsection 79(5)-*exercise of intellectual property rights*

94. Exclusive rights provided by intellectual property law do not of themselves constitute abusive conduct by a dominant firm. The subsection is intended to ensure that actions of firms in dominant positions obtained through exclusive intellectual property are not per se subject to prohibition.

5.3.4 Subsection 79(6)-*3 year limitation*

95. This subsection clarifies the point that no action can be taken against an anti-competitive act by a dominant firm or group of firms three years after the practice has ceased.

5.3.5 Subsection79(7)-*where proceedings commenced under section 45 or 92*

96. This subsection restricts the Commissioner to choose between the conspiracy, the merger or the abuse of dominance provisions when electing to proceed with either a recommendation to the Attorney General (criminal conspiracy) or an application to the Competition Tribunal (under the civil provisions). It codifies for merger, conspiracy and abuse of dominance the principle in common law that no person is to be placed twice in jeopardy for the same or substantially the same cause. The choice of which provision will

depend on the facts of each case and the nature of the remedy sought to alleviate the competition issue.[43]

[43] Section 45 is the criminal conspiracy provision and section 92 is the civil provision with respect to mergers.

Appendix I:

The Abuse of Dominance Provisions of the Competition Act

(Sections 78 and 79)

Abuse of Dominant Position

78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
(f) buying up of products to prevent the erosion of existing price levels;
(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor. R.S., 1985, c. 19 (2nd Supp.), s. 45.

79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be. R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s.31; 1999, c. 2, s. 37.

APPENDIX II

Overview of the Essential Elements Established by the Case law

Control

1. "Control" means "market power" in the economic sense. (*NutraSweet, Laidlaw, Nielsen* and *Tele-Direct*);

2. "Market Power" is "the ability to set prices above a competitive level for a considerable amount of time" *(Laidlaw, Nielsen*)

3. High market share, together with barriers to entry will typically be sufficient to support a finding of "market power" (*NutraSweet, Laidlaw, Nielsen* and *Tele-Direct*)

4. High market share alone will give rise to a *prima facie* conclusion that a party is dominant (*Laidlaw, Nielsen*)

5. In the absence of barriers to entry, firms with high market shares cannot exercise market power (*Tele-Direct*)

6. The existence of sunk costs or economies of scale alone are insufficient to qualify as barriers to entry (*NutraSweet, Laidlaw, Nielsen*)

Class or Species of Business

7. Class or Species of Business is synonymous with "product market" in the economic sense (*NutraSweet, Laidlaw, Nielsen* and *Tele-Direct*)

In Canada or an Area Thereof

8. The words " in Canada or an area thereof" are synonymous with "geographic market" in the economic sense (*NutraSweet, Laidlaw, Nielsen* and *Tele-Direct*).

9. The same test used to define product market(ie substitutability) should be used in defining geographic market *(Laidlaw*).

10. The hypothetical monopolist test provided by the Merger Enforcement Guidelines is inappropriate in defining geographic market in an abuse case, as the issue relates to an existing situation rather than the assessment of a prospective situation as in a merger (*Laidlaw*).

Practice of Anti-Competitive Acts

11. For a "practice " to exist there must be more than an isolated act, and that different anti-competitive acts, taken together , could constitute a "practice" (*NutraSweet and Nielsen*).

12. Subjective intent is not required to conclude that a given practice is of anti-competitive nature (*NutraSweet, Laidlaw* and *Tele-Direct*).

13. In determining whether an alleged anti-competitive act falls within section 78, the nature and purpose of the acts and the effect they have on relevant markets must be determined. The analysis will take into account the commercial interests of the parties and the resulting restriction on competition (*Nielsen, Tele-Direct*).

14. Parties are deemed to intend the effects of their actions in the absence of convincing evidence to the contrary (Laidlaw, Nielsen).

15. The existence or non-existence of legitimate efficiency arguments and business justification are important in determining whether an act is anti-competitive. However,

the Tribunal has cautioned that the existence of some legitimate business purpose alone will not be sufficient to justify the use of anti-competitive acts when a party enjoys substantial market power *(Nielsen, Tele-Direct)*.

Substantial Lessening or Prevention of Competition

16. In order to assess the anti-competitive effect, the Tribunal will focus on the degree to which the anti-competitive acts enhance or preserve barriers to entry and more generally, enhance or preserve market share (*NutraSweet, Nielsen*)

17. The question of substantial lessening of competition can also be equated with the question of whether the anti-competitive acts engaged in "altered the prospects of economically feasible entry" *(Nielsen)*.

18. Where a firm has a high degree of market power in a market which is uncompetitive to begin with, even a small impact on a competitor will be considered substantial (*Tele-Direct*).

APPENDIX III:

EXCLUSIONARY VERTICAL SQUEEZING

a) Introduction

1. The first anti-competitive act listed in Section 78 is "squeezing". This practice is defined in the *Act* as follows:

   (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, *for the purpose of* impeding or preventing the customer's entry into, or expansion in, a market;

2. The practice described in Section 78 is quite specific. It applies to sales by an upstream supplier to a downstream customer with whom that supplier also competes. Squeezing occurs when the supplier raises the wholesale price relative to the retail price thus squeezing the margin between the wholesale and retail prices. It can also occur when the wholesale price remains the same but the supplier lowers the retail price compelling his customer/competitor to follow suit..

3. The concept of "squeezing" from a competition policy perspective is quite different than the notion of profit margin erosion which results from the pressures of vigorous competition. If asked, most competitors will complain that their margins are inadequate and that cutthroat competition is to blame. The fact that margins are being squeezed may speak to the vigor of competition in the market concerned and are not necessarily the result of predatory activity on the part of large firms in the market. Margins may be squeezed when a market is declining, overbuilt or requires rationalization in the face of changing consumer buying patterns. In this case, low margins are an appropriate signal for less efficient firms to exit the market.

b) The Theory of Anti-competitive Forms of Squeezing

4. Section 79 is aimed at squeezing by a dominant firm or group of firms, who engage in this practice *for the purpose of* excluding or predating competitors from the market, or disciplining competitors in the market who pose a competitive threat. That is where the purpose of an exclusionary squeeze is to deter or prevent entry into the downstream market, to confine downstream firms to small niches in the market or to drive downstream competitors out of the market.

5. The consequence of an exclusionary squeeze is that downstream competition is lessened to the point that the firm responsible for the squeezing can exercise market power by increasing margins or lowering quality or service. The purpose of an exclusionary squeeze, therefore, is to earn excess profits. This is distinguishable from a normal loss-minimizing response to a lack of demand or changing buying patterns.

c) Structural pre-conditions for extending market power to another stage of production

6. In assessing whether allegations of price squeezing raise an issue under Section 79, the Bureau will examine the structural conditions of the market in question. In the absence of certain structural conditions, squeezing out a downstream competitor will not be a profitable strategy for a dominant integrated supplier. Certain structural conditions must be fulfilled in both the upstream and the downstream markets in order to make a vertical extension of market power a potentially profitable strategy. First, there must be secure and significant unilateral or joint market power upstream (i.e. in the wholesale market). Otherwise, downstream customers can evade the squeeze by turning to other suppliers. Accordingly, a finding of dominance or joint dominance in the wholesale market is a necessary first step to establishing an anti-competitive price squeeze.

7. Where no single firm is dominate in the market, but a group of firms coordinate their activities to jointly abuse their collective market power, the coordination itself constitutes anti-competitive acts as it artificially confers market power to a group who otherwise would have to compete with one another.

d) Establishing a rationale for the Anti-competitive Squeezing

8. As previously indicated, the mere observation of margin squeezing or margin erosion is not sufficient to support a conclusion of anti-competitive conduct on the part of one or more large firms. Even where the firms in question may be in a dominant market position, it is necessary to closely analyze their pricing behaviour in order to distinguish conduct which provides grounds for an application to the Competition Tribunal from otherwise legitimate market behaviour. As discussed below, there are a number of potential economic scenarios which the Bureau will contemplate as part of its analysis.

9. In situations where it is established that one supplier (wholesaler) possesses the market power required to exercise control and that this control has been acquired through means which do not contravene the *Act*, potential monopoly profits can be extracted simply by charging a monopoly price for the product at the wholesale level. This is not an abuse of market power. In these instances it is not in the supplier's interest to charge a price that would eliminate or discipline his customers as he is already extracting the maximum return.

10. For extension of monopoly power to make sense, it must be shown that domination of one stage of production (ie. wholesale) is not sufficient, that domination of two or more (ie. wholesale and retail) is necessary. There are several instances in which extension of market power to another stage of production could be profitable.

11. One such instance is known as the variable proportions case. If the input supplied by the upstream monopoly is not used by the downstream industry in fixed proportions, upstream

monopoly power cannot be fully exploited simply by setting a monopoly price at wholesale. Because the input can be varied in proportion to other inputs, monopoly power can also be exploited by forcing the customer to use the input in higher proportions than would normally be the case where no monopoly power upstream existed.

12. Other instances in which the extension of market power from one stage to another could be profitable involve evasion of price regulation upstream or the exploitation of opportunities for price discrimination downstream.

13. When there is imperfect competition at both stages of production, integrated firms will always appear to be squeezing their non-integrated rivals. This is because the mark-up of a vertically integrated firm under imperfectly competitive conditions is always less than the sum of the mark-ups of a downstream firm and any unrelated upstream supplier. Economists refer to this as the double mark-up problem. Consider the example of a single dominant upstream firm supplying an input to two imperfectly competitive downstream firms who sell their product to consumers. If there is no vertical integration, the upstream firm charges the downstream firms a price in excess of marginal cost (the standard price in a perfectly competitive market) for the input it sells them. The downstream firms charge an additional mark-up on their product when they sell it to consumers. This is the double mark-up, a mark-up at one stage piled on top of a mark-up at the previous stage.

14. Suppose that the upstream dominant firm integrates forward, merging with one of the downstream firms while continuing to supply the other non-integrated downstream firm. The upstream division of the vertically integrated firm now supplies the downstream division at marginal cost (no mark-up). The downstream division charges a mark-up on its sales to consumers. This single mark-up is less than the sum of the mark-ups formerly charged by the upstream and downstream firms so the vertically integrated firm's output expands, its price falls and its non-integrated downstream rival loses market share and profits. Notwithstanding the loss in profits suffered by the non-integrated downstream

rival, consumers and the economy benefit. With the lower combined mark-up of the integrated firm, non-integrated firms purchasing from integrated appear to be squeezed by the integrated firms. Yet this apparent squeezing need not have anything to do with any strategy of excluding them from the market and would therefore not necessarily be considered to be an anti-competitive act.

e) Criteria for Determining Anti-competitive Squeezing

15. Clearly, determining when squeezing is anti-competitive involves careful analysis. When faced with allegations of anti-competitive squeezing the Bureau will, once it has been established that the target of the complaint has control of the relevant market(s), consider whether the alleged squeezing has had the effect of substantially lessening competition. Establishing a substantial lessening of competition will require a determination that the disciplinary, predatory or exclusionary effects of the squeezing result in maintaining or enhancing the market power of the dominant firm or firm engaged in the squeezing. If this can be established, the Bureau will proceed with the assumption that the squeezing is anti-competitive.

16. There are many different market situations in which one competitor may squeeze the margins of another. Most are consistent with vigorous competition and raise no issue under the *Competition Act*. The form of squeezing which contravenes section 79 involve situations in which a vertically integrated dominant firm or group of firms may find it profitable to squeeze a non-integrated downstream rivals either for disciplinary or exclusionary purposes and where this will ultimately result in higher prices for consumers. The characteristics of these situations are as follows:

1. The structural conditions for dominance or joint dominance at the relevant upstream stage of production (wholesale level, for example) must be satisfied. These criteria are set

out in section 3.2.1(d) of the guidelines. Necessary conditions for inferring control by a group of firms include:

a) The group of firms collectively accounts for a large share of the relevant market. Because of the inherent difficulties of unaffiliated competitors coordinating in a manner that allows them to exercise market power, the collective market share threshold should be more onerous than cases involving single firm dominance.

b) There should be evidence that the effect of the alleged agreement is to increase price or engage in some form of anti-competitive act.

c) There must be evidence of barriers to entry into the group as well as barriers to new entrants into the relevant market. A successful coordinated equilibrium, by definition, raises price within the group above competitive levels and thus creates increased incentives for outside firms to enter the group. One example of evidence of barriers to entry is the use of exclusionary actions that pre-empt entry into the group. As a rule, such coordination suffers from the same difficulties as establishing the agreement in the first instance, and thus there should be evidence of an ability to exclude outside firms (e.g. an asymmetry that provides the jointly dominant firms with a unique advantage over the alleged victim).

d) Even if an agreement is plausible, and there are sufficient barriers to entry into the group, the prospect of intra-group rivalry (i.e. so-called "cheating" on the agreement) is often a powerful constraint on the ability of a group of firms to profitably coordinate. Thus there should be concrete evidence based on the

particular facts of the case that actions have been taken by members of the group to inhibit intra-group rivalry.[44]

e) Finally, there should be evidence that a significant number of customers do not have the ability to employ counter-strategies. Large customers have an incentive, and may often have an ability, to structure procurement activities to counter efforts by a group of firms to dampen intra-group rivalry (for example, by using competitive bidding, by arranging secret transactions with select sellers, or by purchasing output in discrete volumes in order to undermine the implicit output sharing rule necessary to maintain coordinated conduct).

2. It must be established that the elimination or at least substantial diminution of competition at the downstream (retail, for example) stage of production of concern is possible. This requirement can be met by showing that there are entry and re-entry barriers, that there are no close substitutes and that the dominant firm or group already has a significant share of the relevant downstream market.

3. It must be demonstrated that an exclusionary price squeeze has occurred and that it has been sufficiently sustained and systematic to constitute a practice. This requirement can be satisfied by showing that the margin available to non-integrated firms is less than the average incremental costs of the integrated firms at that stage of production.

4. It must be established that the dominant firm has a profit motive for extending its market power to a subsequent stage of production. This requirement can be met by

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[44] Facilitating practices may be aimed at improving the ability of firms to coordinate their actions, or at detecting deviations from the terms of coordination and its subsequent punishment. At the same time, however, such practices may be adopted for business reasons (such as providing price information to consumers or protecting incentives for relation-specific investments) that are unrelated to coordinated conduct. It is necessary to consider the rationale and likely effects of such practices before they are considered as evidence of joint control.

demonstrating that the dominant firm's ability to exploit its market power at the stage of production it dominates is limited.

APPENDIX IV:

SUMMARY OF COMPETITION TRIBUNAL DECISIONS

INTRODUCTION

This Appendix provides a brief summary of the six decisions rendered by the Competition Tribunal since the abuse of dominance provisions were introduced in the *Competition Act* in 1986.[45] Of these six cases, four, NutraSweet, Laidlaw, Nielsen and Tele-Direct, involved contested applications. The other two cases, Interac and CANYPS, involved joint abuse and were resolved by way of consent orders. All six of these cases have resulted in an order by the Tribunal.

This summary of the decided cases illustrates the Tribunal's position on the key elements of section 79. It also provides specific examples of the type of conduct and the circumstances in which the Tribunal has identified and defined anti-competitive acts and the scope and nature of remedies imposed under section 79.

NUTRASWEET

Key Facts

Product Market:	the artificial sweetener aspartame
Geographic Market:	Canada

[45] *Canada v. NutraSweet*, (1990), 32 C.P.R. (2d) 1 (C.T.); [hereinafter "NutraSweet"]; *Canada v. Laidlaw Waste Systems*, (1992), 40 C.P.R. (3d) 289 (C.T.) [hereinafter "Laidlaw"); *Canada v. AGT Directory Ltd. et al*, (1994), C.C.T.D. N° 24 Trib. Dec. N° CT9402/19 [hereinafter "Canyps"]; *Canada v. D and B. Companies*, (1995), 64 C.P.R. (3d) 216 (C.T.) [hereinafter "Nielsen"]; *Dir. Of Inv. And Res. V. Bank of Montreal et al.*, (1996), 68 C.P.R. (3d) (C.T.) [hereinafter "Interac"]; and *Canada v. Tele-Direct (Publications) Inc. et al.*, (1997), 73 C.P.R. (3d) 1 (C.T.) [hereinafter "Tele-Direct].

Market Share: 95%

Application Filed: June, 1989

Tribunal Order: October, 1990

Anti-competitive acts

- Contract clauses imposed by NutraSweet requiring or inducing exclusivity:
  - clauses obligating customers to purchase all their aspartame from NutraSweet;
  - discounts and price allowances granted to customers for use of the NutraSweet logo and name;
  - promotional allowances awarded where only the NutraSweet product was used;
  - meet-or-release and most favoured nation clauses.

"Substantially Lessening Competition"

- high market share enjoyed by NutraSweet;
- the contracts covered 90 % of the market;
- contract exclusivity prevented the entry of competitors;
- barriers to entry, including high customer switching costs, sunk costs, a two-year entry period and the economies of scale.

Order

- prohibited NutraSweet from enforcing the contractual terms requiring or inducing exclusivity;
- prohibited NutraSweet from entering into future contracts containing these provisions.

Other Issues

- allegations of advantages due to the nonpayment of income taxes and predatory pricing were not accepted by the Tribunal as anti-competitive acts;
- no order was made concerning allegations of selling below cost and rebates given to a party to take into account exchange differentials;
- defences raised by NutraSweet of a superior competitive performance, free rider (ie. other parties taking advantage of its investment) as well as efficiency and business justifications were rejected by the Tribunal;

LAIDLAW

Key Facts

Product Market:	commercial waste services, collection and disposal
Geographic Market:	four local communities on Vancouver Island
Market Share:	87%
Application Filed:	March, 1991

Tribunal Order: January, 1992

Anti-competitive acts

- acquisition of competitors;
- lengthy non-compete clauses in purchase agreements of competitors;
- contracting practices:
    - long-term customer contracts with automatic renewal;
    - excessive liquidated damages;
    - rights of first refusal.
    - intimidation through litigation or its threat to inhibit customers from switching suppliers.

"Substantially Lessening Competition"

- the existence of high prices and increases of these prices indicated that Laidlaw possessed market power;
- contracts between Laidlaw and its customers restricted competition;
- high barriers to entry, including Laidlaw's contracting practices which erected barriers to the development of the necessary client base for new entrants;
- acquisition of competitors created local monopoly.

Order

- Laidlaw was forbidden from further acquisitions in three affected markets for three years;
- amendments and deletions to Laidlaw's contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination;
- customers no longer obligated to disclose bids by competitors;
- initial and renewal terms of contracts reduced to one year;
- termination on thirty days notice;
- notification and information requirements imposed on Laidlaw:
    - customers to be advised that contract clauses subject to the order were no longer to be applied;
    - Laidlaw required to explain any amendments of contracts to its customers;
    - the existence of the order was to be made known to customers and mangers;
    - employees were to be given written instructions that compliance with the *Competition Act* was company policy;
    - copies of existing and future contracts were to be provided to the Competition Bureau.

Other Issues

- Laidlaw advanced economic and business justifications for several of the contractual clauses based upon its investments. The Tribunal found that these clauses could not be justified on the basis of efficiency or consumer benefit. The only effect of the acts was to ensure that customers remained with Laidlaw thus creating a barrier to entry;
- Laidlaw argued that the mergers were covered by section 91 of the *Competition Act* and as such could not be anti-competitive under section 78. The Tribunal rejected this proposition;
- The Tribunal condemned the use of litigation or Laidlaw's threats to do so as reprehensible and anti-competitive conduct.

NIELSEN

Key Facts

Product Market:	scanner-based market tracking services
Geographic Market:	Canada
Market Share:	100%
Application Filed:	October, 1994
Tribunal Order:	April, 1995

Anti-competitive acts

- the use of exclusive contracts to deny competitors access to scanner data:
    - long-term contracts (three years or longer);
    - most favoured nation clause to ensure that no competitor paid less for data than Nielsen;
    - strict conditions for termination including lengthy notification requirements and monetary penalties for early termination;
    - renewals structured to occur at different times so as to limit the available sources of data, creating a barrier to entry;
    - payment for exclusive access for data or financial penalties if a retailer supplied data to a competitor.

"Substantially Lessening Competition"

- 100 % control by Nielsen combined with the use of practices designed to bar entry allowed it to maintain and increase its market power;
- Nielsen's practices raised barriers where they did not exist;
- the nature of the industry did not permit entry over time since the data needed for comparison was required from the outset;
- the intent of the contracts and the results of their operation were anti-competitive.

Order

- The Tribunal imposed amendments to the Nielsen contracts:
    - provisions preventing or limiting the supply of data to any party were declared to be null and void;
    - clauses promoting exclusivity of scanner data rendered unenforceable.
    - inducements to limit the supply of data were banned;
    - use of the most favoured nation clause was prohibited for twenty four months after the issuance of the order;
    - the same term was imposed on all future contracts signed within eighteen months of the date of the order;
    - Long term contracts for Nielsen's services were reduced.
- Nielsen ordered to provide fifteen months of data calculated from the date requested by a new entrant competitor, Information Resources, Inc.

Other Issues

- the Tribunal considered several arguments seeking to justify Nielsen's practices, but concluded that the denial of access could not be justified on business or efficiency grounds;
- in finding that the acts were anti-competitive, the Tribunal ruled that the existence of a valid business ground did not mitigate the conduct;

- Nielsen argued that its contracts were necessary to prevent a competitor from "free riding" on its investment. This proposition was also not accepted by the Tribunal.

INTERAC

Key Facts

Product Market:	services associated with the electronic banking network on which transactions are made through automated banking machines and debit cards
Geographic Market:	Canada
Market Share:	100%
Application Filed:	December, 1995
Tribunal Order:	June 20, 1996

Anti-competitive acts

- prohibition on new members;
- higher membership fees for competing financial services providers;
- onerous service fees were for entities which did not have a direct connection to the system but were obligated to go through another member;
- limitations on price competition and services.

"Substantially Lessening Competition"

- no alternative networks and high barriers to entry;
- limited access to the main system;
- limited service and price competition.

Consent Order

- required the respondents to amend the by-laws of Interac in order to:
    - remove restrictions on membership by other financial institutions;
    - allow indirect access by other commercial entities;
    - modify the governance of Interac with respect to the composition of it board;
    - modify pricing practices and procedures for approving new network services.

TELE-DIRECT

Key Facts

Product Market:	telephone directory advertising
Geographic Market:	local markets across Canada
Market Share:	96% advertising space
	25% advertising services

Application Filed: December, 1994

Tribunal Order: February, 1997

Anti-competitive acts

- tied selling of space in Yellow Pages directories to sales services, including advice, design and administration;
- discrimination against independent directory publishers, advertising agencies and consultants as to accounts and commissions;
- targeted price reductions and other competitive strategies against competitive directories.
- refusal to license trade marks.

"Substantially Lessening Competition"

- telephone directory advertising is a distinct market with no close substitutes;
- Tel-Direct had an overwhelming share of the product market;
- entry to the market was not easy.

Order

- Tele-Direct to cease the practice of tying space and services;
- Tele-Direct to price space and service separately or offer an acceptable commission for the service function;

- Tele-Direct to cease discrimination against consultants and customers who use consultants.

Other Issues

- The Tribunal dismissed allegations with respect to:
  - targeted anti-competitive acts against publishers, which the Tribunal found to be legitimate competitive responses to entry;
  - anti-competitive acts directed against advertising agencies on the basis that Tele-Direct was not dominant in this sector of the market and there was no substantial prevention or lessening of competition;
  - the Tribunal concluded that withholding the "Yellow Pages" and "Walking Fingers" logo was a legitimate exercise of rights under the *Trade-Marks Act.*

CANYPS (CANADIAN YELLOW PAGES SERVICE)

Key Facts

Product Market:	national Yellow Pages advertising
Geographic Market:	Canada
Market Share:	90%
Application Filed:	September, 1994
Tribunal Order:	November, 1994

Anti-competitive acts

- restrictions imposed on the sale of national advertising known as the "head office rule" which required to customers to arrange all national Yellow Pages advertising with the publisher serving the province where its head office was located.

"Substantially Lessening Competition"

- the Bureau alleged that the arrangements among the members of CANYPS prevented competition between them and prevented the entry of independent sales agents into this market;

- the respondents controlled 90% of the market.

Consent Order

- Respondents prohibited from:

    - maintaining the head office rule;

    - maintaining exclusive selling arrangements;

    - refusing to deal with selling companies;

    - discriminating between selling companies;

    - refusing to license Yellow Pages trade marks to selling companies;

    - agreeing on commissions or account eligibility criteria for commissions;

    - denying selling companies access to rates and other data published by CANYPS.

- **Respondents required to provide the Bureau with (a) minutes of all CANYPS meetings until July, 1998 and (b) a standard licensing agreement for trade-marks.**